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FIRST DATA MERCHANT SERVICES LLC  
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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION  
12

13 LOUIS FLOYD and TERRY FABRICANT,  
individually and on behalf of all others  
14 similarly situated,

15 Plaintiff,

16 v.

17 FIRST DATA MERCHANT SERVICES  
LLC,

18 SAM'S CLUB MERCHANT SERVICES,

19 NATIONAL PAYMENT SYSTEMS LLC,

20 and

21 NATIONAL PAYMENT SYSTEMS OR,  
22 LLC d/b/a/ ONE CONNECT PROCESSING,

23 Defendants.

Case No. 5:20-cv-02162-NC

**DEFENDANT FIRST DATA MERCHANT  
SERVICES LLC'S ANSWER AND  
AFFIRMATIVE DEFENSES TO  
PLAINTIFFS' COMPLAINT**

Complaint Filed: March 30, 2020

24 Defendant First Data Merchant Services LLC (collectively with "Sam's Club Merchant  
25 Services"<sup>1</sup>, "First Data") for its Answer and Affirmative Defenses to Plaintiffs Louis Floyd's and  
26 \_\_\_\_\_

27 <sup>1</sup> Sam's Club Merchant Services is a trade name for First Data Merchant Services LLC and is not  
28 an independent entity.

1 Terry Fabricant’s (collectively, “Plaintiffs”) Complaint for Injunction and Damages, respectfully  
2 states as follows:

3 **ANSWER**

4 **I. INTRODUCTION**

5 1. First Data denies the allegations against it in Paragraph 1 of the Complaint. The  
6 remaining allegations in Paragraph 1 contain legal conclusions to which no response is required;  
7 to the extent a response is required, the court opinion and statute Plaintiffs cite speak for  
8 themselves and are the best and highest evidence thereof, and First Data denies the remaining  
9 allegations in Paragraph 1 to the extent inconsistent therewith.

10 2. First Data denies the allegations against it in Paragraph 2 of the Complaint.  
11 Paragraph 2 of the Complaint further contains legal conclusions to which no response is required;  
12 to the extent a response is required, the statute Plaintiffs cite speaks for itself and is the best and  
13 highest evidence thereof, and First Data denies the remaining allegations in Paragraph 2 to the  
14 extent inconsistent therewith.

15 3. First Data denies the allegations contained in Paragraph 3 of the Complaint.

16 4. First Data denies the allegations contained in Paragraph 4 of the Complaint.

17 5. First Data admits it contracted with National Payment Systems (“NPS”) to solicit  
18 merchants to execute Merchant Applications with First Data and Wells Fargo Bank, N.A. pursuant  
19 to the terms of the Marketing Agreement between First Data, Wells Fargo Bank, N.A., and NPS.  
20 The Marketing Agreement is the best and highest evidence of the terms thereof, and First Data  
21 denies the allegations in Paragraph 5 to the extent those allegations are inconsistent therewith. First  
22 Data denies the remaining allegations in Paragraph 5 of the Complaint.

23 6. First Data denies the allegations contained in Paragraph 6 of the Complaint.

24 7. First Data denies the allegations contained in Paragraph 7 of the Complaint.

25 **II. PARTIES**

26 8. Paragraph 8 of the Complaint does not appear to assert any allegation against First  
27 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
28

1 of the allegations contained therein; these allegations therefore stand denied.

2 9. Paragraph 9 of the Complaint contains legal conclusions to which no response is  
3 required. Furthermore, Paragraph 9 does not appear to assert any allegation against First Data, and  
4 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
5 allegations contained therein. To the extent a response is required, First Data denies the allegations  
6 contained in Paragraph 9 of Plaintiffs' Complaint.

7 10. Paragraph 10 of the Complaint does not appear to assert any allegation against First  
8 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
9 of the allegations contained therein; these allegations therefore stand denied.

10 11. Paragraph 11 of the Complaint does not appear to assert any allegation against First  
11 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
12 of the allegations contained therein; these allegations therefore stand denied.

13 12. Paragraph 12 of the Complaint contains legal conclusions to which no response is  
14 required. Furthermore, Paragraph 12 does not appear to assert any allegation against First Data,  
15 and First Data is without knowledge or information sufficient to form a belief as to the truth of the  
16 allegations contained therein. To the extent a response is required, First Data denies the allegations  
17 contained in Paragraph 12 of Plaintiffs' Complaint.

18 13. Paragraph 13 of the Complaint does not appear to assert any allegation against First  
19 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
20 of the allegations contained therein; these allegations therefore stand denied.

21 14. First Data admits the allegations contained in Paragraph 14 of the Complaint.

22 15. First Data admits the allegations contained in Paragraph 15 of the Complaint.

23 16. First Data admits its Registered Agent is Corporation Service Company, which has  
24 a physical address at 40 Technology Parkway South, Suite 300, Norcross, GA, 30092. First Data  
25 is without knowledge or information sufficient to form a belief as to the truth of the remaining  
26 allegations in Paragraph 16; these allegations therefore stand denied.

27 17. First Data admits it is registered with the California Secretary of State as a foreign  
28

1 limited liability company. First Data denies any remaining allegations contained in Paragraph 17  
2 of the Complaint.

3 18. First Data admits the allegations contained in Paragraph 18 of the Complaint.

4 19. First Data admits Sam's Club Merchant Services is a trade name for First Data.  
5 First Data denies the remaining allegations contained in Paragraph 19.

6 20. First Data admits Sam's Club Merchant Services is a trade name for First Data,  
7 which is located at 5565 Glenridge Connector NE, Suite 2000, Atlanta, Georgia 30342.

8 21. First Data admits Sam's Club Merchant Services is a trade name for First Data.  
9 First Data further admits its Registered Agent is Corporation Service Company, which has a  
10 physical address at 40 Technology Parkway South, Suite 300, Norcross, GA, 30092. First Data is  
11 without knowledge or information sufficient to form a belief as to the truth of the remaining  
12 allegations in Paragraph 21; these allegations therefore stand denied.

13 22. First Data admits Sam's Club Merchant Services is registered as "Sam's Club  
14 Merchant Credit Card Processing" with the Colorado Secretary of State as a trade name for First  
15 Data. First Data further admits it is registered as a foreign limited liability company with the  
16 Georgia Secretary of State. First Data denies the remaining allegations contained in Paragraph 22  
17 of the Complaint.

18 23. First Data admits Sam's Club Merchant Services is registered as "Sam's Club  
19 Merchant Credit Card Processing" with the Colorado Secretary of State as a trade name for First  
20 Data. First Data further admits it is registered as a foreign limited liability company with the  
21 California Secretary of State. First Data denies the remaining allegations contained in Paragraph  
22 23 of the Complaint.

23 24. First Data admits Sam's Club Merchant Services is registered as "Sam's Club  
24 Merchant Credit Card Processing" with the Colorado Secretary of State as a trade name for First  
25 Data. First Data further admits First Data does business throughout the United States, including in  
26 California. First Data denies the remaining allegations contained in Paragraph 24 of the Complaint.

27 25. Paragraph 25 of the Complaint does not appear to assert any allegation against First  
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1 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
2 of the allegations contained therein; these allegations therefore stand denied.

3 26. Paragraph 26 of the Complaint does not appear to assert any allegation against First  
4 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
5 of the allegations contained therein; these allegations therefore stand denied.

6 27. Paragraph 27 of the Complaint does not appear to assert any allegation against First  
7 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
8 of the allegations contained therein; these allegations therefore stand denied.

9 28. Paragraph 28 of the Complaint does not appear to assert any allegation against First  
10 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
11 of the allegations contained therein; these allegations therefore stand denied.

12 29. Paragraph 29 of the Complaint does not appear to assert any allegation against First  
13 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
14 of the allegations contained therein; these allegations therefore stand denied.

15 30. Paragraph 30 of the Complaint does not appear to assert any allegation against First  
16 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
17 of the allegations contained therein; these allegations therefore stand denied.

18 31. Paragraph 31 of the Complaint does not appear to assert any allegation against First  
19 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
20 of the allegations contained therein; these allegations therefore stand denied.

21 32. Paragraph 32 of the Complaint does not appear to assert any allegation against First  
22 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
23 of the allegations contained therein; these allegations therefore stand denied.

### 24 **III. JURISDICTION AND VENUE**

25 33. First Data denies the allegations contained in Paragraph 33 of the Complaint.

26 34. Paragraph 34 of the Complaint contains legal conclusions to which no response is  
27 required; to the extent a response is required, the statutes speaks for themselves and are the best  
28

1 and highest evidence thereof, and First Data denies the allegations in Paragraph 34 to the extent  
2 inconsistent therewith. First Data denies any remaining allegations in Paragraph 34 of the  
3 Complaint.

4 35. First Data denies the allegations contained in Paragraph 35 of the Complaint.

5 36. First Data denies the allegations contained in Paragraph 36 of the Complaint.

#### 6 IV. FACTS

##### 7 A. “The Enactment of the TCPA and the FCC’s Regulations Thereunder”

8 37. Paragraph 37 of the Complaint contains legal conclusions to which no response is  
9 required; to the extent a response is required, the statute Plaintiffs cite speaks for itself and is the  
10 best and highest evidence thereof, and First Data denies the allegations in Paragraph 37 to the  
11 extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 37 of the  
12 Complaint.

13 38. Paragraph 38 of the Complaint contains legal conclusions to which no response is  
14 required; to the extent a response is required, First Data denies the allegations in Paragraph 38 of  
15 the Complaint.

16 39. Paragraph 39 of the Complaint contains legal conclusions to which no response is  
17 required; to the extent a response is required, the statute Plaintiffs cite speaks for itself and is the  
18 best and highest evidence thereof, and First Data denies the allegations in Paragraph 39 to the  
19 extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 39 of the  
20 Complaint.

21 40. Paragraph 40 of the Complaint contains legal conclusions to which no response is  
22 required; to the extent a response is required, the statute and/or legislative history Plaintiffs cite  
23 speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations  
24 in Paragraph 40 to the extent inconsistent therewith. First Data denies the remaining allegations in  
25 Paragraph 40 of the Complaint.

26 41. Paragraph 41 of the Complaint contains legal conclusions to which no response is  
27 required; to the extent a response is required, the statute and/or legislative history Plaintiffs cite  
28

1 speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations  
2 in Paragraph 41 to the extent inconsistent therewith. First Data denies the remaining allegations in  
3 Paragraph 41 of the Complaint.

4 42. Paragraph 42 of the Complaint contains legal conclusions to which no response is  
5 required; to the extent a response is required, the court opinion Plaintiffs cite speaks for itself and  
6 is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 42 to  
7 the extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 42 of  
8 the Complaint.

9 43. Paragraph 43 of the Complaint contains legal conclusions to which no response is  
10 required; to the extent a response is required, First Data denies the allegations in Paragraph 43 of  
11 the Complaint.

12 44. Paragraph 44 of the Complaint contains legal conclusions to which no response is  
13 required; to the extent a response is required, the Federal Communications Commission record  
14 Plaintiffs cite speaks for itself and is the best and highest evidence thereof, and First Data denies  
15 the allegations in Paragraph 44 to the extent inconsistent therewith. First Data denies the remaining  
16 allegations in Paragraph 44 of the Complaint.

17 45. Paragraph 45 of the Complaint contains legal conclusions to which no response is  
18 required; to the extent a response is required, the statutes and regulation Plaintiffs cite speak for  
19 themselves and are the best and highest evidence thereof, and First Data denies the allegations in  
20 Paragraph 45 to the extent inconsistent therewith. First Data denies the remaining allegations in  
21 Paragraph 45 of the Complaint.

22 **B. “The Worsening Problem of Robocalls and Spam Texts”<sup>2</sup>**

23 46. Paragraph 46 does not appear to assert any allegation against First Data, and First  
24 Data is without knowledge or information sufficient to form a belief as to the truth of the  
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26 <sup>2</sup> Subheading B of the Complaint does not assert any allegation against First Data, and First Data  
27 is without knowledge or information sufficient to form a belief as to the truth of the allegations  
28 contained therein; these allegations therefore stand denied.

1 allegations contained therein; these allegations therefore stand denied.

2         47. Paragraph 47 of the Complaint contains legal conclusions to which no response is  
3 required; to the extent a response is required, the Federal Communications Commission record  
4 Plaintiffs cite speaks for itself and is the best and highest evidence thereof, and First Data denies  
5 the allegations in Paragraph 47 to the extent inconsistent therewith. First Data denies the remaining  
6 allegations in Paragraph 47 of the Complaint.

7         48. Paragraph 48 does not appear to assert any allegation against First Data, and First  
8 Data is without knowledge or information sufficient to form a belief as to the truth of the  
9 allegations contained therein; these allegations therefore stand denied.

10         49. Paragraph 49 does not appear to assert any allegation against First Data, and First  
11 Data is without knowledge or information sufficient to form a belief as to the truth of the  
12 allegations contained therein; these allegations therefore stand denied.

13         50. Paragraph 50 does not appear to assert any allegation against First Data, and First  
14 Data is without knowledge or information sufficient to form a belief as to the truth of the  
15 allegations contained therein; these allegations therefore stand denied.

16         51. Paragraph 51 does not appear to assert any allegation against First Data, and First  
17 Data is without knowledge or information sufficient to form a belief as to the truth of the  
18 allegations contained therein; these allegations therefore stand denied.

19         52. Paragraph 52 does not appear to assert any allegation against First Data, and First  
20 Data is without knowledge or information sufficient to form a belief as to the truth of the  
21 allegations contained therein; these allegations therefore stand denied.

22         53. Paragraph 53 does not appear to assert any allegation against First Data, and First  
23 Data is without knowledge or information sufficient to form a belief as to the truth of the  
24 allegations contained therein; these allegations therefore stand denied.

25         54. Paragraph 54 does not appear to assert any allegation against First Data, and First  
26 Data is without knowledge or information sufficient to form a belief as to the truth of the  
27 allegations contained therein; these allegations therefore stand denied.



1           55. Paragraph 55 does not appear to assert any allegation against First Data, and First  
2 Data is without knowledge or information sufficient to form a belief as to the truth of the  
3 allegations contained therein; these allegations therefore stand denied.

4           56. Paragraph 56 does not appear to assert any allegation against First Data, and First  
5 Data is without knowledge or information sufficient to form a belief as to the truth of the  
6 allegations contained therein; these allegations therefore stand denied.

7           57. Paragraph 57 of the Complaint contains legal conclusions to which no response is  
8 required; to the extent a response is required, the legislation Plaintiffs cite speaks for itself and is  
9 the best and highest evidence thereof, and First Data denies the allegations in Paragraph 57 to the  
10 extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 57 of the  
11 Complaint.

12           **C. “Defendants’ Role in This Growing Problem”<sup>3</sup>**

13           58. First Data is without knowledge or information sufficient to form a belief as to the  
14 truth of the allegations in Paragraph 58; these allegations therefore stand denied.

15           59. First Data denies the allegations cast against it in Paragraph 59 of the Complaint.  
16 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
17 remaining allegations in Paragraph 59 of the Complaint; those allegations therefore stand denied.

18           60. Paragraph 60 of the Complaint contains legal conclusions to which no response is  
19 required; to the extent a response is required, First Data denies the allegations against it in  
20 Paragraph 60 of the Complaint and is without knowledge or information sufficient to form a belief  
21 as to the truth of the remaining allegations in Paragraph 60 of the Complaint; those allegations  
22 therefore stand denied.

23           61. First Data denies the allegations cast against it in Paragraph 61 of the Complaint.  
24 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
25 remaining allegations in Paragraph 61; those allegations therefore stand denied.

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27 <sup>3</sup> First Data denies the allegations contained in Subheading C of the Complaint.  
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1           62.     First Data denies the allegations contained in Paragraph 62 of the Complaint.

2           63.     Paragraph 63 of the Complaint contains legal conclusions to which no response is  
3 required; to the extent a response is required, First Data denies the allegations against it in  
4 Paragraph 63 of the Complaint and is without knowledge or information sufficient to form a belief  
5 as to the truth of the remaining allegations in Paragraph 63 of the Complaint; those allegations  
6 therefore stand denied.

7           64.     First Data is without knowledge or information sufficient to form a belief as to the  
8 truth of the allegations in Paragraph 64; these allegations therefore stand denied.

9           65.     First Data denies the allegations cast against it in Paragraph 65 of the Complaint.  
10 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
11 remaining allegations in Paragraph 65; those allegations therefore stand denied.

12           **D.     “A Prior Lawsuit asked First Data, National Payment Systems, and One**  
13 **Connect to Stop Making Telemarketing Robocalls without Consent.”<sup>4</sup>**

14           66.     First Data admits Blake Cooley filed a class action complaint against First Data and  
15 Defendant National Payment Systems OR, LLC d/b/a One Connect Processing (“One Connect”)  
16 on March 13, 2019 in the U.S. District Court for the Northern District of Georgia, captioned *Cooley*  
17 *v. First Data Merchant Services, LLC et al.*, 1:19-cv-01185-TWT (“Georgia Litigation”). First  
18 Data further states the class action complaint speaks for itself and is the best and highest thereof,  
19 and First Data denies the allegations in Paragraph 66 to the extent inconsistent therewith. First  
20 Data denies the remaining allegations in Paragraph 66 of the Complaint.

21           67.     Paragraph 67 of the Complaint does not appear to assert any allegation against First  
22 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
23 of the allegations contained therein; these allegations therefore stand denied.

24           68.     Paragraph 68 of the Complaint does not appear to assert any allegation against First  
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26 <sup>4</sup> First Data admits Plaintiff Floyd filed a lawsuit against First Data, National Payment Systems,  
27 and One Connect alleging violations of the Telephone Consumer Protection Act. First Data denies  
28 it made “Telemarketing Robocalls” without consent and denies any remaining allegations in  
Subheading D of the Complaint.

1 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
2 of the allegations contained therein; these allegations therefore stand denied.

3 69. Paragraph 69 of the Complaint does not appear to assert any allegation against First  
4 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
5 of the allegations contained therein; these allegations therefore stand denied.

6 70. First Data denies authorizing, instructing, supervising, directing, approving, or  
7 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
8 in Paragraph 70 of the Complaint do not appear to assert any allegation against First Data, and  
9 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
10 remaining allegations contained therein; these allegations therefore stand denied.

11 71. First Data denies authorizing, instructing, supervising, directing, approving, or  
12 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
13 in Paragraph 71 of the Complaint do not appear to assert any allegation against First Data, and  
14 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
15 remaining allegations contained therein; these allegations therefore stand denied.

16 72. First Data lacks knowledge or information sufficient to form a belief as to the truth  
17 of the allegations against it in Paragraph 72 of the Complaint, and therefore denies these  
18 allegations. The remaining allegations in Paragraph 72 do not appear to assert any allegation  
19 against First Data, and First Data is without knowledge or information sufficient to form a belief  
20 as to the truth of the allegations contained therein; those allegations therefore stand denied.

21 **E. "Despite the *Cooley* Litigation, Mr. Floyd Was Repeatedly Robocalled."**<sup>5</sup>

22 73. Paragraph 73 of the Complaint does not appear to assert any allegation against First  
23 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
24 of the allegations contained therein; these allegations therefore stand denied.

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25  
26 <sup>5</sup> Subheading E of the Complaint does not appear to assert any allegation against First Data, and  
27 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
28 allegations contained therein; these allegations therefore stand denied.

1           74. Paragraph 74 of the Complaint does not appear to assert any allegation against First  
2 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
3 of the allegations contained therein; these allegations therefore stand denied.

4           75. First Data denies the allegations in Paragraph 75 of the Complaint.

5           76. Paragraph 76 of the Complaint does not appear to assert any allegation against First  
6 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
7 of the allegations contained therein; these allegations therefore stand denied.

8           77. Paragraph 77 of the Complaint does not appear to assert any allegation against First  
9 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
10 of the allegations contained therein; these allegations therefore stand denied.

11           78. Paragraph 78 of the Complaint does not appear to assert any allegation against First  
12 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
13 of the allegations contained therein; these allegations therefore stand denied.

14           79. First Data denies authorizing, instructing, supervising, directing, approving, or  
15 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
16 in Paragraph 79 of the Complaint do not appear to assert any allegation against First Data, and  
17 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
18 remaining allegations contained therein; these allegations therefore stand denied.

19           80. First Data denies authorizing, instructing, supervising, directing, approving, or  
20 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
21 in Paragraph 80 of the Complaint do not appear to assert any allegation against First Data, and  
22 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
23 remaining allegations contained therein; these allegations therefore stand denied.

24           81. First Data denies authorizing, instructing, supervising, directing, approving, or  
25 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
26 in Paragraph 81 of the Complaint do not appear to assert any allegation against First Data, and  
27 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
28

1 remaining allegations contained therein; these allegations therefore stand denied.

2 82. First Data denies authorizing, instructing, supervising, directing, approving, or  
3 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
4 in Paragraph 82 of the Complaint do not appear to assert any allegation against First Data, and  
5 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
6 remaining allegations contained therein; these allegations therefore stand denied.

7 83. First Data denies authorizing, instructing, supervising, directing, approving, or  
8 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
9 in Paragraph 83 of the Complaint do not appear to assert any allegation against First Data, and  
10 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
11 remaining allegations contained therein; these allegations therefore stand denied.

12 84. First Data denies authorizing, instructing, supervising, directing, approving, or  
13 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
14 in Paragraph 84 of the Complaint do not appear to assert any allegation against First Data, and  
15 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
16 remaining allegations contained therein; these allegations therefore stand denied.

17 85. Paragraph 85 of the Complaint does not appear to assert any allegation against First  
18 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
19 of the allegations contained therein; these allegations therefore stand denied.

20 86. Paragraph 86 of the Complaint does not appear to assert any allegation against First  
21 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
22 of the allegations contained therein; these allegations therefore stand denied.

23 87. First Data denies the allegations contained in Paragraph 87 of the Complaint.

24 88. Paragraph 88 of the Complaint does not appear to assert any allegation against First  
25 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
26 of the allegations contained therein; these allegations therefore stand denied.

27 89. Paragraph 89 of the Complaint does not appear to assert any allegation against First  
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1 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
2 of the allegations contained therein; these allegations therefore stand denied.

3 90. Paragraph 90 of the Complaint does not appear to assert any allegation against First  
4 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
5 of the allegations contained therein; these allegations therefore stand denied.

6 91. Paragraph 91 of the Complaint does not appear to assert any allegation against First  
7 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
8 of the allegations contained therein; these allegations therefore stand denied.

9 92. First Data denies authorizing, instructing, supervising, directing, approving, or  
10 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
11 in Paragraph 92 of the Complaint do not appear to assert any allegation against First Data, and  
12 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
13 remaining allegations contained therein; these allegations therefore stand denied.

14 93. First Data denies authorizing, instructing, supervising, directing, approving, or  
15 permitting One Connect to offer First Data's products and/or services. The remaining allegations  
16 in Paragraph 93 of the Complaint do not appear to assert any allegation against First Data, and  
17 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
18 remaining allegations contained therein; these allegations therefore stand denied.

19 94. First Data lacks knowledge or information sufficient to form a belief as to the truth  
20 of the allegations cast against it in Paragraph 94 of the Complaint, and therefore denies these  
21 allegations. The remaining allegations in Paragraph 94 do not appear to assert any allegation  
22 against First Data, and First Data is without knowledge or information sufficient to form a belief  
23 as to the truth of the remaining allegations contained therein; these allegations therefore stand  
24 denied.

1           **F.       “Despite the *Cooley* Litigation, Mr. Fabricant Was Robocalled.”<sup>6</sup>**

2           95.     Paragraph 95 of the Complaint does not appear to assert any allegation against First  
3 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
4 of the allegations contained therein; these allegations therefore stand denied.

5           96.     Paragraph 96 of the Complaint does not appear to assert any allegation against First  
6 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
7 of the allegations contained therein; these allegations therefore stand denied.

8           97.     Paragraph 97 of the Complaint does not appear to assert any allegation against First  
9 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
10 of the allegations contained therein; these allegations therefore stand denied.

11          98.     Paragraph 98 of the Complaint does not appear to assert any allegation against First  
12 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
13 of the allegations contained therein; these allegations therefore stand denied.

14          99.     Paragraph 99 of the Complaint does not appear to assert any allegation against First  
15 Data, and First Data is without knowledge or information sufficient to form a belief as to the truth  
16 of the allegations contained therein; these allegations therefore stand denied.

17          100.    First Data denies the allegations contained in Paragraph 100 of the Complaint.

18          101.    First Data admits that Mr. Jermaine Brown sent Mr. Fabricant an email with the  
19 subject “Sam’s Club Merchant Services” in response to an affirmative inquiry by Mr. Fabricant to  
20 Sam’s Club Merchant Services requesting information about merchant services. First Data denies  
21 Mr. Brown provided Mr. Fabricant with an application via email. First Data further states it was  
22 Mr. Fabricant who stated to Mr. Brown, “I was supposed to get a merchant agreement with this.  
23 Please send one.” First Data denies the remaining allegations in Paragraph 101 of the Complaint.

24          102.    Paragraph 102 of the Complaint does not appear to assert any allegation against  
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26 <sup>6</sup> Subheading F of the Complaint does not appear to assert any allegation against First Data, and  
27 First Data is without knowledge or information sufficient to form a belief as to the truth of the  
28 allegations contained therein; these allegations therefore stand denied.

1 First Data, and First Data is without knowledge or information sufficient to form a belief as to the  
2 truth of the allegations contained therein; these allegations therefore stand denied.

3 103. Paragraph 103 of the Complaint does not appear to assert any allegation against  
4 First Data, and First Data is without knowledge or information sufficient to form a belief as to the  
5 truth of the allegations contained therein; these allegations therefore stand denied.

6 104. First Data denies the allegations contained in Paragraph 104 of the Complaint.

7 **G. “Defendants’ Autodialing”<sup>7</sup>**

8 105. Paragraph 105 of the Complaint contains legal conclusions to which no response is  
9 required; to the extent a response is required, First Data denies the allegations in Paragraph 105 of  
10 the Complaint.

11 106. Paragraph 106 of the Complaint contains legal conclusions to which no response is  
12 required; to the extent a response is required, First Data denies the allegations in Paragraph 106 of  
13 the Complaint.

14 107. Paragraph 107 of the Complaint contains legal conclusions to which no response is  
15 required; to the extent a response is required, First Data denies the allegations in Paragraph 107 of  
16 the Complaint.

17 108. Paragraph 108 of the Complaint contains legal conclusions to which no response is  
18 required; to the extent a response is required, First Data denies the allegations in Paragraph 108 of  
19 the Complaint.

20 109. Paragraph 109 of the Complaint contains legal conclusions to which no response is  
21 required; to the extent a response is required, First Data denies the allegations in Paragraph 109 of  
22 the Complaint.

23 110. First Data denies the allegations contained in Paragraph 110 of the Complaint.

24 111. First Data denies the allegations contained in Paragraph 111 of the Complaint.

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27 <sup>7</sup> First Data denies any allegations against it contained in Subheading G of the Complaint.



**H. “The Invasion of Privacy Caused by Defendants’ Automated Telemarketing”<sup>8</sup>**

112. First Data denies the allegations contained in Paragraph 112 of the Complaint, including all subparts.

**I. “First Data, Sam’s Club Merchant Services, and National Payment Systems Are Vicariously Liable for One Connect’s TCPA Violations”<sup>9</sup>**

113. Paragraph 113 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the Federal Communications Commission record Plaintiffs cite speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 113 to the extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 113 of the Complaint.

114. Paragraph 114 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, First Data denies the allegations in Paragraph 114 of the Complaint.

115. Paragraph 115 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the Federal Communications Commission record Plaintiffs cite speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 115 to the extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 115 of the Complaint.

116. Paragraph 116 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the Federal Communications Commission record Plaintiffs cite speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 116 to the extent inconsistent therewith. First Data denies the remaining allegations in Paragraph 116 of the Complaint.

117. First Data denies the allegations contained in Paragraph 117 of the Complaint.

<sup>8</sup> First Data denies the allegations in Subheading H of the Complaint.

<sup>9</sup> First Data denies the allegations contained in Subheading I of the Complaint.

1           118. First Data admits it contracted with NPS to solicit merchants to execute Merchant  
2 Applications with First Data and Wells Fargo Bank, N.A. pursuant to the terms of the Marketing  
3 Agreement between First Data, Wells Fargo Bank, N.A., and NPS. The Marketing Agreement is  
4 the best and highest evidence thereof, and First Data denies the allegations in Paragraph 118 to the  
5 extent the allegations are inconsistent therewith. First Data also denies NPS solicited merchants to  
6 execute Merchant Applications with Sam's Club Merchant Services. First Data denies the  
7 remaining allegations in Paragraph 118 of the Complaint.

8           119. First Data denies the allegations contained in Paragraph 119 of the Complaint.

9           120. First Data denies the allegations contained in Paragraph 120 of the Complaint.

10          121. Paragraph 121 of the Complaint contains legal conclusions to which no response is  
11 required; to the extent a response is required, First Data denies the allegations in Paragraph 121 of  
12 the Complaint.

13          122. First Data denies the allegations contained in Paragraph 122 of the Complaint.

14          123. First Data denies the allegations contained in Paragraph 123 of the Complaint.

15          124. Paragraph 124 of the Complaint contains legal conclusions to which no response is  
16 required; to the extent a response is required, the court's order in the Georgia Litigation speaks for  
17 itself and is the best and highest evidence thereof, and First Data denies the allegations in  
18 Paragraph 124 to the extent inconsistent therewith. First Data denies any ruling in that order is  
19 binding in this litigation and denies the remaining allegations in Paragraph 124 of the Complaint.

20          125. Paragraph 125 of the Complaint contains legal conclusions to which no response is  
21 required; to the extent a response is required, the court's order in the Georgia Litigation speaks for  
22 itself and is the best and highest evidence thereof, and First Data denies the allegations in  
23 Paragraph 125 to the extent inconsistent therewith. First Data denies any ruling in that order is  
24 binding in this litigation and denies the remaining allegations in Paragraph 125 of the Complaint.

25          126. Paragraph 126 of the Complaint contains legal conclusions to which no response is  
26 required; to the extent a response is required, the court's order in the Georgia Litigation speaks for  
27 itself and is the best and highest evidence thereof, and First Data denies the allegations in  
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Paragraph 126 to the extent inconsistent therewith. First Data denies any ruling in that order is binding in this litigation and denies the remaining allegations in Paragraph 126 of the Complaint.

127. Paragraph 127 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the court's order in the Georgia Litigation speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 127 to the extent inconsistent therewith. First Data denies any ruling in that order is binding in this litigation and denies the remaining allegations in Paragraph 127 of the Complaint.

128. Paragraph 128 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the court's order in the Georgia Litigation speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 128 to the extent inconsistent therewith. First Data denies any ruling in that order is binding in this litigation and denies the remaining allegations in Paragraph 128 of the Complaint.

129. Paragraph 129 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the court's order in the Georgia Litigation speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 129 to the extent inconsistent therewith. First Data denies any ruling in that order is binding in this litigation and denies the remaining allegations in Paragraph 129 of the Complaint.

130. Paragraph 130 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the court's order in the Georgia Litigation speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 130 to the extent inconsistent therewith. First Data denies any ruling in that order is binding in this litigation and denies the remaining allegations in Paragraph 130 of the Complaint.

131. Paragraph 131 of the Complaint contains legal conclusions to which no response is required; to the extent a response is required, the court's order in the Georgia Litigation speaks for itself and is the best and highest evidence thereof, and First Data denies the allegations in Paragraph 131 to the extent inconsistent therewith. First Data denies any ruling in that order is binding in this litigation and denies the remaining allegations in Paragraph 131 of the Complaint.

1           132. Paragraph 132 of the Complaint contains legal conclusions to which no response is  
2 required; to the extent a response is required, the court's order in the Georgia Litigation speaks for  
3 itself and is the best and highest evidence thereof, and First Data denies the allegations in  
4 Paragraph 132 to the extent inconsistent therewith. First Data denies any ruling in that order is  
5 binding in this litigation and denies the remaining allegations in Paragraph 132 of the Complaint.

6           133. Paragraph 133 of the Complaint contains legal conclusions to which no response is  
7 required; to the extent a response is required, the Federal Communications Commission record  
8 Plaintiffs cite speaks for itself and is the best and highest evidence thereof, and First Data denies  
9 the allegations in Paragraph 133 to the extent inconsistent therewith. First Data denies the  
10 remaining allegations in Paragraph 133 of the Complaint.

#### 11                                   **V. CLASS ACTION ALLEGATIONS**

12           134. First Data denies the allegations contained in Paragraph 134 of the Complaint,  
13 including all subparts.

14           135. First Data denies the allegations contained in Paragraph 135 of the Complaint.

15           136. First Data denies the allegations contained in Paragraph 136 of the Complaint.

16           137. First Data denies the allegations contained in Paragraph 137 of the Complaint.

17           138. First Data denies the allegations contained in Paragraph 138 of the Complaint.

18           139. First Data denies the allegations contained in Paragraph 139 of the Complaint.

19           140. First Data denies the allegations contained in Paragraph 140 of the Complaint.

20           141. First Data denies the allegations contained in Paragraph 141 of the Complaint,  
21 including all subparts.

22           142. First Data denies the allegations contained in Paragraph 142 of the Complaint.

23           143. First Data denies the allegations contained in Paragraph 143 of the Complaint.

24           144. First Data denies the allegations contained in Paragraph 144 of the Complaint.

25           145. First Data denies the allegations contained in Paragraph 145 of the Complaint.

26           146. First Data denies the allegations contained in Paragraph 146 of the Complaint.

27           147. First Data denies the allegations contained in Paragraph 147 of the Complaint.

1           148. First Data lacks knowledge or information sufficient to form a belief as to the truth  
2 of the remaining allegations in Paragraph 148 of the Complaint and therefore denies these  
3 allegations.

4           149. First Data denies the allegations contained in Paragraph 149 of the Complaint.

5           150. First Data denies this forum is a desirable, efficient location in which to resolve this  
6 dispute. First Data lacks knowledge or information sufficient to form a belief as to the truth of the  
7 remaining allegations in Paragraph 150 of the Complaint and therefore denies these allegations.

8           151. First Data denies the allegations contained in Paragraph 151 of the Complaint.

9           152. First Data denies the allegations contained in Paragraph 152 of the Complaint.

10                                   **VI. FIRST CLAIM FOR RELIEF**

11           153. First Data incorporates, as if set forth fully herein, its answers and defenses to the  
12 previous paragraphs.

13           154. First Data denies the allegations contained in Paragraph 154 of the Complaint.

14           155. First Data denies the allegations contained in Paragraph 155 of the Complaint.

15           156. First Data denies the allegations contained in Paragraph 156 of the Complaint.

16                                   **VII. PRAYER FOR RELIEF**

17           First Data denies all allegations contained in Plaintiffs' "Prayer for Relief," including all  
18 subparts, and denies Plaintiffs are entitled to any of the relief they seek.

19                                   **VIII. DEMAND FOR JURY**

20           The "Demand for Jury" paragraph of Plaintiffs' Complaint does not contain any allegation  
21 against First Data to which a response is required. To the extent a response is required, First Data  
22 denies the allegations contained in the "Demand for Jury" paragraph of Plaintiffs' Complaint.

23           The allegations contained in Plaintiffs' request for jury trial contains legal conclusions to  
24 which no response is required; to the extent a response is required, First Data denies the allegations  
25 contained in this Paragraph of the Complaint.

26                                   **IX. SIGNATURE ATTESTATION**

27           First Data lacks knowledge or information sufficient to form a belief as to the truth of the  
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1 allegations contained in this Paragraph of the Complaint and therefore denies these allegations.

2 **GENERAL DENIAL**

3 First Data denies each and every allegation and/or statement contained in the Complaint  
4 not expressly admitted herein.

5 **AFFIRMATIVE DEFENSES**

6 **FIRST AFFIRMATIVE DEFENSE**

7 Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

8 **SECOND AFFIRMATIVE DEFENSE**

9 If Plaintiffs and/or any putative class member sustained any injuries or damages, the fact  
10 and extent of which First Data expressly denies, any such injuries or damages were either entirely,  
11 or in part, proximately caused by or contributed by the conduct or fault of others over whom First  
12 Data had no control and for whom First Data is not legally responsible. The acts, negligence, or  
13 fault of others must be compared to, and operate to reduce or completely bar, Plaintiffs' alleged  
14 right to recovery against First Data.

15 **THIRD AFFIRMATIVE DEFENSE**

16 Plaintiffs' claims are barred to the extent Plaintiffs or any member of the putative class  
17 would be unjustly enriched.

18 **FOURTH AFFIRMATIVE DEFENSE**

19 On information and belief, Plaintiffs and/or the putative class members' claims are barred  
20 by express consent and/or express written consent of Plaintiffs and/or putative class members (or  
21 their agents, spouses, relatives, or other persons authorized to give consent) to receive text  
22 messages, phone calls, and/or any other form of contact or communication for products and/or  
23 services provided by First Data.

24 **FIFTH AFFIRMATIVE DEFENSE**

25 Plaintiffs' and/or the putative class members' claims are barred, in whole or in part, by the  
26 doctrines of estoppel, waiver, unclean hands, and/or ratification.

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**SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and/or the putative class members’ claims are barred, in whole or in part, by reason of First Data’s good faith.

**SEVENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs’ and/or the putative class members’ claims relate to activities protected by the First Amendment to the Constitution of the United States, and any applicable state constitutions, the claims are barred.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs fail to allege they and/or the putative class members suffered a concrete injury sufficient to allege an injury-in-fact under Article III of the United States Constitution.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and/or the putative class members’ claims are barred in whole or in part as they have not suffered actual or cognizable damages.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and/or the putative class members’ damages, if any, were caused by their own actions or inactions.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs’ and/or the putative class members’ damages, if any, were caused by persons or entities other than First Data.

**TWELFTH AFFIRMATIVE DEFENSE**

To the extent Plaintiff and/or the putative class members have suffered actual damages, which is denied, then Plaintiffs’ and/or the putative class members’ claims are barred in whole or in part by the failure to mitigate damages or avoidance of consequences.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs have alleged the “class numbers in the thousands, or more.” (Compl. ¶ 138.) Application of 47 U.S.C. § 227 in this case would thus violate the Due Process Clause under the Fifth and Fourteenth Amendments to the United States Constitution, and if a class was to be

1 certified and liability was found, the statutory damages provided under 47 U.S.C. § 227 would be  
2 grossly disproportionate to any alleged “harm” suffered by Plaintiffs and/or the putative class  
3 members.

4 **FOURTEENTH AFFIRMATIVE DEFENSE**

5 Plaintiff and/or the putative class members’ claims cannot be awarded treble damages  
6 because First Data did not engage in knowing or willful conduct.

7 **FIFTEENTH AFFIRMATIVE DEFENSE**

8 Plaintiff and/or the putative class members are not entitled to a statutory award of  
9 attorneys’ fees under federal or state law.

10 **SIXTEENTH AFFIRMATIVE DEFENSE**

11 First Data did not authorize, instruct, supervise, or direct NPS or One Connect to send any  
12 of the complained-of text messages during the alleged time period, such text messages were not  
13 sent by First Data, and First Data did not authorize, control or supervise the manner and means by  
14 which the complained-of text messages were sent.

15 **SEVENTEENTH AFFIRMATIVE DEFENSE**

16 First Data is not vicariously liable for the purported conduct of any other Defendant in this  
17 action.

18 **EIGHTEENTH AFFIRMATIVE DEFENSE**

19 If any other Defendant in this action acted unlawfully, such Defendant did so without the  
20 authorization, whether actual or apparent, and/or knowledge of First Data.

21 **NINETEENTH AFFIRMATIVE DEFENSE**

22 Plaintiffs’ and/or putative class members’ claims are barred, in whole or in part, because  
23 at all times First Data acted lawfully.

24 **TWENTIETH AFFIRMATIVE DEFENSE**

25 Plaintiffs’ claims for a class action are barred because Plaintiffs cannot establish the  
26 requisite elements under Federal Rule of Civil Procedure 23.

27 **TWENTY-FIRST AFFIRMATIVE DEFENSE**



1 The Court lacks personal jurisdiction over a nationwide class action and/or over the claims  
2 of non-resident putative class members.

3 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

4 The Northern District of California is an improper venue to litigate Fabricant's claims.

5 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

6 Plaintiffs' and/or putative class members' claims are or may be barred by the applicable  
7 statute(s) of limitation.

8 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

9 Plaintiffs' and/or putative class members' claims are or may be barred by the doctrine of  
10 laches and offset.

11 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

12 Plaintiffs' and/or putative class members' claims may be barred in whole or in part by safe  
13 harbor protections of federal and/or state regulations or statutes.

14 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

15 Venue in this Court is or may be improper.

16 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

17 First Data hereby gives notice of its intention to rely upon such other affirmative defenses  
18 as may become available or apparent during the course of discovery, and thus reserves the right to  
19 amend its Answer and Affirmative Defenses to assert such defenses.

20  
21 Dated: May 8, 2020

Respectfully Submitted,

22 POLSINELLI LLP

23  
24 By: /s/ John W. Peterson  
John W. Peterson

25 Attorney for Defendant  
26 FIRST DATA MERCHANT SERVICES  
27 LLC  
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that a true and correct copy of the foregoing was filed and served  
3 electronically upon the following via the Court's ECF system on May 8, 2020:

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